KAREN BRINKMANN PLLC
TELECOM, MEDIA & TECHNOLOGY LAW

1800 M Street, NW
Suite 800-North
Washington, DC 20036
Tel: 202.365.0325
KB@KarenBrinkmann.com

October 14, 2016

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Business Data Services In an Internet Protocol Environment; Special Access For Price Cap Local Exchange Carriers,* WC Docket No. 16-143, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

Alaska Communications files these supplemental comments concerning the Business Data Services ("BDS") rulemaking in response to Chairman Wheeler's recently released "Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market"[1] and recent filings by other parties in the above-captioned dockets. This letter supplements the information Alaska Communications presented in its Comments and Reply Comments[2] and letters filed on August 23 and September 2[3] in these dockets.

---

[1] "Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market" (rel. Oct. 7, 2016), available at: https://www.fcc.gov/document/chmn-wheelers-update-business-data-services-rules ("Chairman's Proposal").

[2] *Business Data Services In an Internet Protocol Environment, et al.,* WC Docket Nos. 16-143, 05-25, RM-10593, Comments of Alaska Communications (filed June 28, 2016) ("Alaska Communications Comments"), Reply Comments of Alaska Communications (filed August 9, 2016) ("Alaska Communications Reply Comments").

[3] Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Sept. 2, 2016) ("ACS Sept. 2 Letter"); Letter from Karen Brinkmann, Counsel to Alaska Communications, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 23, 2016).

Alaska Communications Operates In a Highly Challenging BDS Market

In its prior filings, Alaska Communications demonstrated that the Commission has no basis to regulate advanced services provided by Alaska Communications, or declare the special access offerings in its price cap service areas to be "non-competitive" under any recognized standard.[4] Competition in the price cap service areas not only is robust, but also is dominated – to the extent any service provider can be said to be "dominant" – by a provider that is not the ILEC, General Communication, Inc. ("GCI").[5] Alaska Communications has documented that its share of the BDS market – both TDM-based and packet-switched – is less than 50 percent[6] and the rates it charges are below those of most other price cap carriers in the nation.[7] The only non-competitive part of the BDS market in Alaska is the middle mile component where GCI controls unregulated monopoly facilities to the Bush.[8] Nevertheless, some parties continue to insist that the BDS market, nationally, is in need of Commission regulation, ignoring this substantial body of record evidence.

The Chairman's Plan For National Reform Fails To Address the Alaska Market

The Commission initially proposed that BDS regulation be "technologically neutral" yet it failed to propose any regulation applicable to competitors other than the incumbent local exchange carriers ("ILECs"). The Commission leapt to the presumption – which is categorically incorrect in Alaska – that the ILEC is the "largest" provider in any geographic market and therefore must be regulated.[9] The Commission sought comment on appropriate definition of the geographic and product markets for BDS regulation.

---

4 Alaska Communications Reply Comments at 2-8.

5 Alaska Communications Reply Comments at 14-18.

6 ACS Sept. 2 Letter, Barnes Declaration ¶6.

7 ACS Sept. 2 Letter, Bishop Declaration ¶6.

8 Alaska Communications Reply Comments at 14-15.

9 Alaska Communications and a variety of other BDS providers – ILECs as well as competitors – oppose these regulations as without foundation in the record. *E.g.,* Comments of Alaska Communications in WC Docket Nos. 16-143 & 05-25, RM-10593 (filed June 28, 2016) at 5-6, 14; Reply Comments of Alaska Communications in WC Docket Nos. 16-143 & 05-25, RM-10593 (filed August 9, 2016) at 1-2; Comments of Comcast Corporation in WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed June 28, 2016) at 25 ("the Commission should let any measures to remove barriers to competitive entry and investment play out before pursuing more drastic regulatory intervention in the BDS marketplace"); Joint Reply Comments of CenturyLink, Consolidated, FairPoint & Frontier, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed August 9, 2016) at 13 ("Proposals to reduce BDS rates are flawed as a matter of econometrics"); Reply Comments of General Communication, Inc., WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed August 9, 2016) at 9 ("ACS is correct that […] the presence of two facilities-based competitors 'does make the market sufficiently competitive [such] that no *ex ante* price regulation is necessary'").

Recently, Chairman Wheeler revealed that he now believes *all* geographic markets should be treated alike for purposes of BDS regulation.[10] All price cap ILEC TDM-based BDS services would be brought under price caps[11] – though it is not clear how carriers who have "Phase II" pricing flexibility would make the transition from contract terms to tariffed terms. The Chairman would grant a modified form of "Phase I" pricing flexibility for TDM-based services at DS3 and lower capacity, in all price cap markets, but curtail standard volume and term discount provisions, effectively gutting the flexibility.[12] As a price cap carrier that has pricing flexibility in several markets, this change would *diminish* Alaska Communications' ability to compete for BDS contracts. Such services also would be hit with across-the-board 11 percent rate reductions, phased in over three years, followed by further annual reductions under a so-called productivity factor.

Packet-based services and circuit-based services above the level of DS3 (45 Mbps) would be classified as telecommunications services but forborne from some aspects of Title II regulation.[13] Again, as with TDM-based services, all geographic markets would be regulated alike under the Chairman's plan.

BDS services offered by non-ILEC providers (such as GCI in Alaska) would not be subject to price caps or any other price regulation, regardless of the provider's size, the extent of its network, or its market share. The Chairman says that he would classify cable companies and other non-ILEC providers of packet-based services and circuit-based services above 45 Mbps as telecommunications carriers, but it is not clear what such classification would mean. He does not propose to regulate any entity except the ILEC under price caps.

<u>The Chairman's Proposed Reforms Cannot Reasonably Be Applied to Alaska</u>

Like other proposals in this proceeding from parties that offer nationwide or regional services, the Chairman's proposal ignores the market dynamics and actual competition in Alaska's particular price cap markets. It suffers from a number of critical flaws where Alaska is concerned.

First, the Chairman's proposal assumes that the price cap ILEC is always in need of price regulation.[14] The Chairman does not allow for the alternative that markets are competitive, nor for the alternative that a competitor other than the ILEC, such as the cable operator, actually is

---

[10] *See* Chairman's Proposal.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See id.*

the largest and dominant provider in the market and the only entity meriting rate regulation. But those alternatives represent the reality in Alaska.

While the record demonstrates that Alaska is a relatively small market economically, and may not attract as many competitors as some other locations, there is still ample evidence that competition is thriving. Alaska Communications has documented robust price competition, the healthy market share of competitors, and innovation and expansion of service offerings that typically characterize competitive markets.[15] Indeed, Alaska Communications is not alone in observing that there is *no justification* for requiring three, four or more competitors before declaring a market to be competitive.[16] In Alaska, two competitors are sufficient to provide robust competition throughout the price cap territories, though other service providers also compete.[17] There is no justification for ongoing price cap regulation of BDS services offered by Alaska Communications.

The Chairman's plan provides no meaningful deregulation where price cap carriers lack market power – nor even acknowledge that there may be markets where this is the case. In Alaska, however, the price cap ILEC, Alaska Communications, is over-regulated, constraining full-blown price competition with GCI, the dominant BDS provider. The Chairman's proposed Phase I pricing flexibility, with severe constraints on volume and term discounts, fails to grant the real flexibility Alaska Communications needs when competing for enterprise customers. The Chairman presumes that only "small businesses" purchase TDM-based services,[18] but in Alaska, with its extremely low population density, DS1 and comparable bandwidth services are purchased by all manner of customers throughout the state – and thus the market for this level of service is highly competitive. Where the Chairman sees "emerging competition and falling prices" in the sector for "packet-based services and circuit-based services above the level of DS3

---

[15] *See, e.g.,* Alaska Communications Reply Comments at 14-18; ACS Sept. 2 Letter, Bishop Declaration ¶¶3-7, Barnes Declaration ¶¶3-5.

[16] *E.g.,* Letter from Dr. Joseph V. Farrell *et al.,* to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, 15-247 (filed Sept. 14, 2016) at 1-2 ("we are troubled by pending proposals that would impose widespread rate regulation in all markets that do not have either three or more, or four or more, BDS providers present") ("Economists' Sept. 14 Letter"); Joint Comments of CenturyLink, Consolidated, FairPoint and Frontier, WC Docket No. 16-143 (filed June 28, 2016) at 57 (welfare-maximizing outcomes can arise from just two competitors in a market).

[17] *See, e.g.,* ACS Sept. 2 Letter; Alaska Communications Reply Comments; Alaska Communications Comments.

[18] *Id.*

(45 Mbps),"[19] customers in Alaska experience just as much competition at the DS1 level and bandwidths below 45 Mbps.[20]

Adopting the Chairman's proposal would result in similarly asymmetric regulation of *packet-switched* services below 50 Mbps. The Chairman's proposal states that the FCC will "apply greater scrutiny when there is evidence of rates for low-bandwidth Ethernet service that are materially higher than rates for the nearest-bandwidth TDM" service, and when "there is evidence of rates that are materially higher than those charged by the same provider for the same circuit in nearby buildings with competition." Yet because only the ILEC's TDM rates are regulated, the public will have sufficient visibility to permit such scrutiny of only the *ILEC's* rates.

A team of world-class economic experts (including several former FCC Chief Economists) recently observed that the record in this proceeding fails to support the types of regulation being advanced for BDS, and the Commission would be justified in regulating legacy BDS offerings, if at all, in geographic areas "where only a single facilities-based provider is present or nearby."[21] Otherwise, the Commission stands to do more harm than good.

Economists consistently warn of the dangers of over-regulation. Michael Katz and Bryan Keating document the harmful effects of price regulation that is not carefully tailored to entrenched monopoly circumstances.[22] Over-regulation is known to diminish competition, discourage investment, and delay innovations sought by customers. A number of parties have commented that forced BDS rate reductions would trigger reductions in their capital

---

[19] *Id*
[20] ACS Sept. 2 Letter, Bishop Declaration ¶6; Barnes Declaration ¶6.
[21] *Id.* at 4.
[22] Reply Declaration of Michael Katz and Bryan Keating, Ex. A to Reply Comments of National Cable & Telecommunications Ass'n ("NCTA"), WC Docket Nos.16-143 & 05-25, ¶85 (filed Aug. 9, 2016).

investments.[23] Such effects would harm new entrants and incumbents alike.[24] The administrative costs affect both the U.S. government and the industry – and the consumer picks up the tab. Such costs should cause the Commission to hesitate before wading into new regulation of advanced services such as Ethernet – where competitors now offer more connections than ILECs[25] – and should deter the Commission from re-regulation of legacy services that are quickly declining in volume. The benefits of such regulation do not outweigh the costs (with the exception of the isolated markets where entrenched monopolies persist).

The BDS market "exhibits multiple characteristics that promote competition in the presence of two or more facilities-based providers, including sophisticated buyers and large sunk costs combined with low incremental costs," unlike an entrenched monopoly situation.[26] The economists conclude that the record in this proceeding fails to support regulation in markets with two or more BDS providers[27] – such as the markets Alaska Communications serves.

Second, the Chairman assumes that there will be annual productivity gains on an order not supported by the record, rather than proposing to tie future rate reductions to any showing of actual productivity gains. In fact, there is no basis in the record to expect that "productivity" gains on the order of 11 percent, and additional gains going forward, could be achieved in Alaska

---

[23] *E.g.,* Letter from Mike Saperstein, Frontier, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed Oct. 4, 2016) ("any significant reductions in business data services (BDS) revenue will trigger the need for workforce reductions and capex reductions"); Letter from Karen Brinkmann, Counsel to FairPoint Communications, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, RM-10593 (filed August 23, 2016) ("FairPoint has focused on productivity, but has not recently experienced productivity gains. It cannot afford across-the-board rate reductions in special access and other business services, whether styled as a 'productivity dividend' or otherwise. Such reductions very likely would cut into FairPoint's capital expenditures in the rural parts of its price cap territories, and also discourage other service providers from offering BDS in those areas"); Comcast Comments at 43 ("economic models strongly indicate that the imposition of rate caps would have substantially reduced the network build-out Comcast undertook in recent years and would materially curtail such build-out in the future").

[24] *See, e.g.,* Anna-Maria Kovacs, "Business Data Services: The Potential Harm to Competitive Facilities Deployment," Center for Business and Public Policy, Georgetown University (October 2016), attached to Letter from Diane Griffin Holland, US Telecom, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143 & 05-25, RM-10593 (filed Oct. 6, 2016); Letter from Steven Morris, NCTA, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143 & 05-25, RM-10593 (filed Oct. 4, 2016) ("NCTA Oct. 4 Letter").

[25] NCTA Oct. 4 Letter n. 8, *citing* Vertical Systems Group, Mid-Year 2016 U.S. Carrier Ethernet Leaderboard (Aug. 18, 2016).

[26] Economists' Sept. 14 letter at 2.

[27] *Id.*

price cap markets. As previously demonstrated, since converting to price caps in 2009, Alaska Communications' rates for both TDM-based services and Ethernet services have been falling as fast as or faster than in the largest price cap markets in the Lower 48 states.[28] BDS rates charged by Alaska Communications are not "artificially high" as presumed by the Chairman. Despite operating in a high cost environment, the DS1 and DS3 offerings of Alaska Communications already are among the lowest in the nation.[29] In fact, even after other providers cut their rates by 11%, Alaska Communications' current rates *still* will be materially lower than elsewhere in the nation. Mandating further rate reductions would send the wrong signal to this market, even as customers are increasingly substituting packet-switched and circuit-switched offerings.

Third, the Chairman's plan represents yet another missed opportunity to address the problems created by today's unregulated middle-mile monopoly in the Alaskan Bush.[30] While the Commission's Order addressing universal service funding for GCI and other members of the Alaska Telephone Association found that the purpose of that proceeding was not to "require recipients to ensure reasonably comparable rates in their middle mile offerings,"[31] rate regulation is precisely the purpose of this BDS proceeding, and BDS cannot be provided in the Bush without adequate and affordable middle-mile capacity.[32] Yet, the Chairman's plan lets pass this opportunity to improve access to middle mile services in Alaska because it fails to address the real locus of market power in Alaska, GCI's monopoly control of backhaul (middle mile)

---

[28] ACS Sept. 2 Letter, Supplemental Blessing Declaration, Att. 1. Further, Alaska Communications' DS1 and DS3 rates were subjected to price caps in 2009, well after most of the other price cap carriers. Any productivity gains before that time would have been captured in the cost-based rates the company used to initiate price caps.[28] For this reason, too, it would be inappropriate to apply the full amount of any nationwide price cap reduction to the price cap rates of Alaska Communications.

[29] *Id.*

[30] *See Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-115 (rel. Aug. 31, 2016), Dissenting Statement of Commissioner Mignon L. Clyburn.

[31] *Id.* at ¶ 79.

[32] *See Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Notice of Proposed Rulemaking, WC Docket No. 16-143 (rel. May 2, 2016), at 3 ("[B]ackhaul, a form of BDS used by wireless carriers, is critical to the ability of wireless carriers to expand and operate their networks today and will be even more critical as the advent of 5G wireless drives the creation of the dense thicket of cell sites that will be needed to deliver high bandwidth wireless services. Thus, at the core of the Commission's proposal is the adoption and application of a new Competitive Market Test designed to identify the markets in which current and potential competition is bringing material competitive effects to customers, most notably through lower prices.").

transport in the Bush (off-road areas of Alaska not connected to fiber infrastructure).[33] This is the sole portion of the Alaska BDS market that remains unserved – and cannot be reached – by two or more facilities-based providers. That is the one and only BDS market in Alaska that could benefit from FCC intervention, yet the Commission's present proceeding fails to address the lack of high-speed middle mile competition.

In short, the Chairman and the Commission should recognize that Alaska differs from other states in the types of services purchased, the types of service providers, and the extent of competition in all on-road markets. FCC actions affecting the BDS market should reflect these differences. Alaska Communications agrees with the proposal by Frontier, Windstream and Sprint to segregate markets based on who serves them,[34] but another tier is needed in that plan: one for ILECs who face competition throughout their service areas, and who are *not* the "largest BDS provider" in any of their service areas. Alaska Communications belongs in that tier. It is true that larger service providers "benefit enormously from economies of scale"[35] and in Alaska that provider is the dominant cable operator/long-haul fiber operator – whose BDS offerings are entirely unregulated today – not the ILEC.

Conclusion

The Chairman's proposal to cap rates and adopt burdensome new regulations is inappropriate and unreasonable for Alaska. None of the BDS regulatory schemes proposed in this proceeding, whatever their merits may or may not be in the rest of the nation, are appropriate for Alaska given the BDS market conditions and industry structure in this state. Indeed, none of the proponents of regulation even attempt to address the Alaska BDS market. It simply is not the target of their desired regulation.

The only regulatory framework that is appropriate for Alaska is to expand pricing flexibility where it was once granted, permit "Phase II" flexibility in all areas where competition already has made GCI equal with or superior to the ILEC, and refrain from imposing any regulation on non-common carrier services such as Ethernet that are competitively offered today. Where the Commission should find a bottleneck – namely, in middle mile serving the Bush – it should adopt appropriate safeguards. Regulations should be imposed on the one entity that truly possesses market power in Alaska, to bring middle-mile rates under control so that local markets

---

[33] Alaska Communications Reply Comments at 15-24.

[34] Letter from Kathleen Q. Abernathy, Frontier Communications, Charles W. McKee, Sprint Corp. & Eric N. Einhorn, Windstream Services, LLC, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143, 05-25, RM-10593 (filed October 3, 2016) at 5-6.

[35] Letter from Kathleen Q. Abernathy, Frontier Communications, Charles W. McKee, Sprint Corp. & Eric N. Einhorn, Windstream Services, LLC, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 16-143 & 05-25, RM-10593 (filed Oct. 3, 2016) at 5.

can expand and ILECs can offer innovative services in off-road areas.. This is the only solution that will enhance rather than inhibit competition in the Alaska BDS market.

Please direct any questions regarding this matter to me.

Very truly yours,

Karen Brinkmann

Karen Brinkmann
Counsel to Alaska Communications

cc: Ruth Milkman
Stephanie Weiner
Travis Litman
Nick Degani
Amy Bender
Claude Aiken
Paul DeSa
Matthew DelNero
Deena Shetler
Pamela Arluk
David Zesiger
Bill Kehoe
Bill Layton
Eric Ralph
Bill Dever